

**Authoritative Control or Binding Agreements? : The
Restriction of Political Freedom under Malaysia's
Constitution (Amendment) Act 1971**

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Presented at IKMAS Seminar Room,
31 January 2011 (Monday)

INTRODUCTION

Every society limits the freedom of individuals, either by convention or written law, in order to regulate individuals' behaviour, maintain the cohesion of society, and enable collective decisions to be made through peaceful means. Yet, the form and substance of the limit on freedom varies depending on a society's political and historical conditions and paths: from a liberal setting that only restricts actions that are defamatory or against public order to broader restrictions imposed to control the groups that are believed to be opposed to the political status quo.

Malaysia, a multi-ethnic society, where cleavage along ethnicity is distinct and distribution among ethnic groups often constitutes a point of contention, has a unique set of limits on freedom. The most prominent is the legal restriction on political rights regarding ethnic issues. After the ethnic violence in 1969, Malaysians amended their Federal Constitution by inserting a new Article 10(4) that empowers Parliament to pass laws that prohibit citizens from questioning constitutional provisions related to ethnic matters such as citizenship (Part III), the use and study of languages (Article 152), and the special position of *Bumiputeras*

(Malays and other natives of the State of Sabah and Sarawak) and the legitimate interest of other communities (Article 153), otherwise than in relation to the implementation of these provisions.

Since its enactment in 1971, Article 10(4) and the Sedition Act, which was amended accordingly to stipulate questioning these "sensitive" provisions as a crime, regulate Malaysia's multi-ethnic society that comprises of *Bumiputera* (66%), Chinese (26%), Indian (8%) and others. The significance of the Article lies in the context of decades-long debate on the affirmative action towards Malays and other *Bumiputera*. This action had been implemented based on Article 153, especially after the introduction of the New Economic Policy (NEP) aiming to redress the economic disparity between Malays and non-Malays in the field of the economy, employment and education.

It is also important to note that the Article was followed by the formation of a big coalition called Barisan Nasional (BN). BN was formed in 1974 by the United Malays National Organization (UMNO) as the dominant component party, and Malaysian Chinese Association (MCA), Malaysian Indian Congress (MIC) and several opposition parties that accepted the Constitution amendment in 1971. As the BN strengthened its foothold, the pattern of interest representation through the BN component parties, most of which are ethnic parties, became prevalent.

Since 1974, the BN has been in power. Accordingly, the pattern of ethnic representation and the affirmative action, with Article 10(4) as constitutional bedrock, has endured almost four decades. However, the 2008 general election where the opposition coalition significantly eroded the BN's dominance in Parliament, from 90% of the seats in 2004 to 63%, showed that the BN and the ethnic representation pattern institutionalized under it are not free from challenges. We can also observe an increasing contestation over the affirmative action and the limit of freedom under Article 10(4).

Why did Malaysians introduce the limit on freedom as embodied in Article 10(4)? Answering this question does not only give us an account of this historic legislation but also an insight as to the endurance of the rule and recent signs of change.

By elucidating the power dynamics and the normative underpinnings behind Article 10(4), this paper argues that Malaysians introduced the restriction of political freedom on ethnic matters in an attempt to protect the constitutional rights and interests of various ethnic communities from being attacked or violated by others in the democratic process. The bargain was struck among political and societal groups representing the interests of Malays that tried to enhance their economic welfare by protecting their special position, and non-Malay groups that aimed to protect their constitutional rights—legitimate interest, citizenship, use and study of languages, and the right to express opinion regarding the implementation of these rights—from the attack by the majority ethnic group, particularly, Malay politicians. The agreement, thus established, constrained the behaviour of ethnic groups, governing and opposition parties and the government, and contributed to the endurance of the role and the regime based on it.

In order to support this assertion, this paper first provides an overview of the constitutional amendment and reviews prior studies on it. In the following sections, through document research, particularly newspaper articles and *Penyata Rasmi Parlimen Dewan Rakyat* (Official Report of House of Representatives), the paper recounts the background to the constitutional amendment, and proceeds to identify the interests of various political and societal groups. After this, the paper expounds on the underlying dynamics of the legislation as a “binding agreement” and discusses its impact on the Malaysian politics to date. In the concluding section, the paper examines the prospects for change.

OVERVIEW OF CONSTITUTION (AMENDMENT) ACT 1971 AND ITS NARRATIVES

The Constitution (Amendment) Bill 1971 was tabled in Parliament in February 1971. After 19 months of its suspension, Parliament passed the bill as a reaction to the ethnic riot in May 1969 that followed the huge electoral setback by the Alliance Party, the governing coalition that consisted of UMNO, MCA and MIC. The bill contained the following amendments¹.

Firstly, the bill inserted the new clause (4) to Article 10 “Freedom of speech, assembly and association.” The clause reads “...Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.” The provisions concerned are as follows: national language —Malay language— and use and study of the other languages (Article 152); special position of the Malays and natives of the states of Sabah and Sarawak (Article 153); citizenship (Part III); and Sultan’s sovereignty (Article 181).

Secondly, the bill amended Article 63 “Privileges of Parliament” and Article 72 “Privileges of Legislative Assembly” by inserting new clauses providing that these privileges “shall not apply to any person charged with an offence under the law passed by Parliament under Clause (4) of Article 10 or with an offence under the Sedition Act 1948.”

Thirdly, the above provisions were entrenched by the amended Clause (5) of Article 159 which stipulated that Article 10(4), any law passed under it, Part III, Article 63(4), 72(4), 152 and 153 shall not be amended without the consent of the Conference of Rulers.

Fourthly, Article 152 was amended. Article 152 provides that the national language shall be the Malay language; but that “no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning, any other language...”; and that nothing in the Clause shall prejudice the right of the Government to preserve and sustain the use and study of the language of any other community. The Bill inserted new Clause (6) to define “official purpose” as “any purposes of the Government, whether Federal or State, and includes any purpose of a public authority.”

Finally, the Bill amended Article 153. The Article provides the responsibility of the King to safeguard the special position of the Malays and other *Bumiputeras* in reserving land, positions in the public service, scholarship and other educational opportunities, permits and licenses for trade and business on the one hand, and the legitimate interests of the other

¹ For legal account on the amendments, refer to Harding (2007).

communities on the other. In the 1971 amendment, Clause (8A) was inserted to empower the King to give directions to the authority to ensure the reservation of the reasonable proportion of places in higher educational institution to the *Bumiputeras*.

The amendment bill was passed by a vote of 126 to 17. Those in favour were the Alliance Party, and opposition parties including Gerakan Rakyat Malaysia (GRM) and Pan-Malayan Islamic Party (PAS), which later formed BN together with the Alliance component parties. The Democratic Action Party (DAP) was the only bloc that voted against the bill while the People's Progressive Party (PPP) abstained.

The constitutional amendment marked a departure from the previous regime where the freedom of citizens was restricted mainly for the purpose of checking the leftist movement. Harding (2007) argues the 1971 amendment was a departure from the Independence Constitution in that it moved Malaysia's constitutional regime away from liberal democratic setting and also entrenched the "sensitive issues" and amendment procedures regarding the provisions.

Existing body of literatures offer various explanations on the introduction of the amendment. Studies that deem Malaysia as a type of Consociational Democracy explain the amendment as a reassurance of agreement among ethnic groups represented by Alliance leaders, which stabilized the inter-ethnic relations in the country. Based on the understanding that democracy in multi-ethnic countries can be well managed by the consociational model—vertical integration of ethnic groups and horizontal cooperation among the elites of the respective groups, von Vorys (1975) writes about the 1971 constitutional amendment as follows: "[I]t is intended to de-radicalize politics by preventing political confrontations along communal lines. Before communal issues could become sufficiently acute to attract mass support within the various communal groups, they would be settled by secret negotiations" among the elite. "Only then would communal groups be mobilized" (1975: 435).

The validity of this line of explanation is called in question when we note that the amendment aimed at introducing wider restrictions on freedom, which is not anticipated in the consociational model². Besides, as will be discussed below, the ethnic riot in 1969 and the subsequent constitutional amendment primarily reflected the dissatisfaction of a wider spectrum of people over the agreement among the Alliance elites on the ethnic issues. It is unlikely that a mere reinforcement of the established elites' rule would restore the state of equilibrium.

Based on the same perspective, but also noting the power asymmetry between UMNO and other political parties, Mauzy (1983) presents the Amendment mainly as the UMNO leaders' engineering to avoid ethnic conflict by excluding the ethnic issues often raised by the opposition, and also to formalize the Malay dominance while retaining room for inter-elite accommodation. Later literature emphasize the restrictive rather than accommodative

² Lijphart (1977: 153), the advocate of the model, wrote that Malaysia did not fit to the model after the 1971 amendment.

aspect of Malaysian political regime, and capture the Amendment as a product of power differential among ethnic groups and political parties.

For example, some studies argue that the amendment was promoted by Malays, specifically, UMNO to enhance their welfare. Referring to the favourable political power distribution to UMNO, these studies (Cheah, 2003: 126-7; Jesudason, 1989: 77) emphasize that the 1971 amendment bill was to restrict non-Malays' freedom of questioning the special position of *Bumiputeras* and NEP. Another line of argument is presented in Khoo (1997: 57) where he asserts that the Government "extracted major concessions from all the political parties in the price for restoring parliamentary rule."

In sum, these literatures explain the amendment by the will and power of the Malays or government, on one hand, and the subjugation of non-Malays or opposition parties, on the other. While the argument based on the consociational framework may duly be negated considering the qualitative change in the constitutional regime and the prevalent power asymmetry among ethnic groups, the view from later literature is neither free from questions. The most critical among them will be the following: why the minority ethnic groups and opposition parties accepted or acquiesced to the legislation? As will be stated, it was not only Malay political parties and governing parties that voted for the Amendment bill, but non-Malay and opposition parties. Besides, it is quite unconceivable that a unilateral legislation by Malays, who merely consisted 55% of the population (Malaysia 1976: 319), has stably, if not without challenges, been implemented and become the normative underpinning of the BN for close to four decades.

These questions urge us to revisit the process of the 1971 constitutional amendment not only from the will of the dominant forces but from a holistic perspective that covers the views and actions of various groups involved in the legislation. What were the motives of respective groups in supporting the amendment? What kind of political process unfolded? In search for the alternative explanation of the 1971 amendment, the following section traces the background to the constitutional amendment.

1969 GENERAL ELECTION AND ITS AFTERMATH: ALLIANCE AGREEMENT IN QUESTION AND THE RISING ETHNIC CONSCIOUSNESS

The direct background to the constitutional amendment is the 1969 general election and the events that followed immediately. However, to provide a longer historical context to these flow of events, one needs to go back to the history of the making of the Constitution before Independence.

The Articles on citizenship, national language and the special position of the Malays were the products of careful drafting by the Reid Commission and deliberation among the British government, the Alliance parties and Sultans. Constitutional provisions reflected a bargain

among them, especially among Alliance parties, which is often referred to as “social contract” in the current political context³.

For example, unlike the Malays who automatically became citizens, citizenship was a concern among the non-Malays who needed to fulfil the residential qualifications in the pre-Independence period. This was, subsequently, decided based on the *jus soli* principle as demanded by MCA and MIC. For those who were born outside of the country, a rather liberal eight-year residence condition was applied. As for language, the parties agreed that Malay language was the national language, but that the use and study of the other languages such as Chinese and Tamil were guaranteed, and that English could be used in Parliament at least for ten years after independence.

The special position of the Malays was another contested issue. There was a general agreement that the special position of the Malays introduced under the British colonial rule should be retained. Meanwhile, the MCA and Chinese community expressed their anxiety over the possible interpretation of the position to the disadvantage of non-Malays and suggested the insertion of a phrase to guarantee the interest, rights and opportunity of the other ethnic groups. While this suggestion was reflected in Article 153, the issue of time frame of the special position remained ambiguous. Based on the understanding of Alliance leaders and Sultans that special position was a temporary provision, the initial draft by the Commission recommended the position be reviewed fifteen years after the independence. However, the time frame was later dropped, as a result of the opposition from the members of UMNO and PAS who mainly represented the interest of Malays in rural and lower stratum (Fernando, 2002; Thomas, 2008).

Based on the agreement on the rights and interests of ethnic groups, the Alliance held the reins of government after independence. However the agreement soon came to be questioned as anxiety and dissatisfaction in the area of language and economy mounted, and as opposition parties, which had not been represented in the drafting process, challenged the pivotal constitutional provisions.

Among them was the Democratic Action Party (DAP), formed by a branch of People’s Action Party (PAP) of Singapore after the country’s secession in 1965. The issue of language developed into a dispute when PAP/DAP advocated the use of Tamil and Chinese languages for official purposes. The Government tried to settle the dispute by the National Language Act 1967 providing Malay language as the sole official language while guaranteeing the use of English in Parliament and courts, and Chinese, Tamil and English for the translation of official documents. However, the Act ended up causing dissatisfaction both from DAP representing the Chinese speaking community and members of UMNO and PAS advocating wider use of Malay language.

Another issue was the economy. In the 1965, UMNO members and Malay bureaucrats organized the Second *Bumiputera* Economic Congress and challenged the imbalance in

³ This term appears in the contemporary debate over the affirmative action and the claim by Malay groups on the *Ketuanan Melayu* (Malay supremacy) attached to their “indigenous” origin. Refer to Cheah (2005), Fernando (2002), Norani (2008) and Thomas (2008) for the legal and historical account on “social contract.”

equity ownership among ethnic group⁴, and demanded wider government intervention in economy to enhance Malay participation in the commercial and industrial sectors. Dissatisfaction over economic distribution also came from the lower class non-Malays, who suffered from widespread unemployment due to low labour absorption of the import substitution industry and regarded the special position of the Malays as the obstacle to their economic welfare (Funston, 1980; Jesudason 1989; Jomo, 1986). They sympathized with PAP/DAP and PPP opposing the special position under the banner of "Malaysian Malaysia." On the other hand, PAS argued the possible marginalization of Malays both in economics and politics by non-Malays who were conferred citizenship after Independence (*Berita Harian*, 5 Mei 5, 10 1969).

These issues came to the fore at the Parliamentary election campaign in 1969. Opposition parties, namely PAS, DAP and PPP, that focused on the issues of language, special position of the Malays and citizenship, and GRM though with less communal appeal, substantially increased their presence in Parliament. Newly formed GRM gained 8 seats, PAS increased from 9 to 12, PPP from 2 to 3, and DAP from 1 to 13. Alliance, on the other hand, decreased their seats: UMNO from 59 to 51, MIC from 3 to 2, and the hardest hit MCA from 27 to 13, which resulted in the decline of MCA's influence in the Government. After the release of the election result, parades organized by DAP and GRM and a march by a group of UMNO politicians clashed, leading to the May 13 riot. A state of emergency was declared, Parliament was suspended and the National Operations Council (NOC) that consisted of Alliance parties, military and police was established to bring the country back to normalcy⁵.

The development after the riot up to the bill can best be understood by the rising awareness and anxiety over constitutional rights of respective ethnic groups, which led to the increasing demand for protection of these rights through constitutional amendments. Nonetheless, the constitutional amendment was not the only option. After the riot, three ideas about the future course of the country's democracy were brought up: (a) gradual re-democratization through inculcating goodwill among people; (b) prompt reconvening of Parliament; and (c) modification to the existing political institution by introducing a new type of restriction of political freedom.

Then Prime Minister Tunku Abdul Rahman said that Parliament should reconvene only when he was confident that speeches in Parliament would not harness bad will among people. In order to ensure it, he argued, "everyone taking part in politics must first take an oath to honour and uphold democracy and the Constitution" and "not to bring up racial issues in future elections" (*Straits Times, hereafter ST*, 16, 22 August, 5 October 1969). Tunku was in an opinion that individual self-control and goodwill were the sufficient conditions for the restoration of democracy. On the other hand, DAP and the Bar Council called for an immediate restoration of Parliament without amending the Constitution and the liberal principle enshrined in it (*ST*, 2 August, 7 October 1969).

⁴ The share of equity ownership in 1969 is as follows: Malays 1.5%, Chinese 22.8%, Indian 0.9%, governments 2.6%, foreigners 62.1%, others 10.1% (Malaysia, 1971: 40).

⁵ For varying accounts on May 13, refer to Malaysia (1969) and Kua (2007).

Other Alliance leaders sought for the way to normalize the inter-racial relations while retaining the basic framework of democratic institution. Then Home Minister Dr. Ismail Abdul Rahman challenged the PM's argument by suggesting laws prohibiting people from questioning the special position of Malays, its time frame, and the status of Malay language as the sole official language (*ST*, 18 July, 3 August 1969). Abdul Razak, the Director of the NOC, attributed the riot to the disapproval by a portion of people of the Constitution that guaranteed special position of the Malays and the legitimate interest of the non-Malays (*ST*, 13 August 1969). He argued that there should be "ground rules to prevent people of a multi-racial society from treading on one another's sensitivities" (*ST*, 14 September 1969). In a similar way, MCA President Tan Siew Sing said, "before we return to Parliamentary rule, we must...change the rules of the game to ensure that fundamental policies and principles cannot be questioned under any circumstances" (*ST*, 5 August 1969).

Eventually, this idea gained momentum, as the consideration for the special position, legitimate interest and citizenship generally outweighed the respect for the individual political freedom as a result of the development following the riot. After the riot in May 1969, Malay students, inspired by young UMNO members including Dr. Mahathir Mohamed, argued that Tunku "sold out" Malays to Chinese. They demanded the resignation of Tunku as the PM, the expansion of the power of the Sultans to protect the special position of the Malays, and even confiscation of some of the properties of and deprivation of citizenship of Chinese (*Far Eastern Economic Review*, 7 August 1969: 320-2). This movement was subsequently captured by the UMNO politicians as a general outcry of Malays over the implementation of the special position.

The anti-Tunku movement was soon banned, but it caused a visible decline in his influence and subsequently had a huge impact on the political landscape. The impact first appeared in the speeches of the UMNO leaders, who called for the implementation of the special position of the Malays while acknowledging the need to pay attention to non-Malays' legitimate interests. For example, Dr. Ismail changed his explanation on the cause of the riot from "irresponsible politicians and...supporters who could not contain themselves" (*ST*, 9 June 1969) to the fear of Malays "that their rights were not only challenged but would be deprived" (*ST*, 5 October 1969), and argued "the Government...reaffirms its intention to implement" Article 153, for "the implementation of this provision had left much to be desired" (*ST*, 3 August 1969).

A similar rhetorical change occurred in the government agencies. The Department of National Unity (DNU), one of the agencies in charge of drafting NEP, initially observed that the riot was stirred up by the jobless youth and announced that NEP was to create employment for young people in rural areas. This announcement was well received by non-Malay dominant business circle for its "non-racial" approach (*ST*, 4, 9 July 1969). However, in five months, DNU published a report that emphasized the economic disparity between Malays and non-Malays as the main cause of the riot and proposed the employment pattern reflecting demographic structure, increase in Malay capital ownership, and the expansion of public sector for this purpose (DNU 1969). In October 1969, the NOC published the whitepaper titled "The May 13th Tragedy" which cited the political violation on the provisions on Malay language and the special position of the Malays by "immigrant races,"

the agitation by the "racist parties" such as DAP and GRM, and the desperation on the part of Malays over their survival and welfare as causes for the riot (NOC 1969).

The increasing assertion of UMNO politicians on the protection of special position and the Government's move in accordance with it intensified anxiety among non-Malay politicians and economic groups that their interest and rights would be imperilled by the increasing claim of the special position of the Malays. Business groups including the Associated Chinese Chambers of Commerce (ACCC), the Indian Chamber of Commerce and the United Chambers of Commerce were particularly cautious about the sign of the Government intervention into economy for the purpose of redressing inter-ethnic distribution⁶.

Anxiety of non-Malays over the Government intervention into economy mounted when the Government implemented the Employment (Restriction) Act 1968 that required non-citizen employees to register and obtain work permits. The Act, which originally targeted 12 sectors, was expanded to cover all sectors by the NOC decision, citing unemployment among citizens that had reached 7.5% as the reason. The decision, which was believed to affect 59,000 workers, 80% of who were eligible to citizenship, incited intense reaction from the non-Malay society (*ST*, 22 September, 29 October 1969). For example, the ACCC said that the Government could not expect industries to operate at a loss just to have a racially proportionate workforce (*ST*, 18 October 1970). Organizations such as MCA, GRM, Malaysian Trades Union Congress (MTUC), National Union of Plantation Workers representing the Indian workers and other unions regarded the decision detrimental to non-citizen non-Malay workers, and pleaded fair and flexible issue of permit to labourers who had long been contributing to Malaysian economy (*ST*, 14, 19, 22, 25, 29 September 1969).

Another decision by the NOC came as a blow to non-Malay society. NOC announced the review of citizenship certificate obtained by 250,000 citizens under Article 30 of the Constitution, which reads "[T]he Federal Government may, on the application of any person with respect to whose citizenship a doubt exists, whether of fact or of law, certify that that person is a citizen." The Government explained that there were cases where certificates were issued to applicants who had not taken language exam, and whose residential qualifications were not stated, whose applications had not been made by the applicants themselves (*ST*, 6 November 1969). This decision heightened uncertainty about citizenship among non-Malays who already started to feel uneasiness with the remarks on the issue during the election campaign. Naturally, MCA, GRM, DAP, PPP and ACCC vehemently opposed to the decision (*ST*, 3, 4, 6, 7, 8, 21 November 1969).

The above flow of events can be understood as a chain of increased ethnic consciousness. Triggered by the student movement, UMNO politicians became increasingly vocal on the necessity to protect their special position. This caused non-Malay groups to deepen their anxiety over the possible violation of their legitimate economic interest and citizenship in the process of the implementation of the special position of the Malays by the Government,

⁶ ACCC's initiative to establish the Sino-Malay Economic Advisory Board and an investment company to assist Malays by giving grants and loans indicates Chinese businessmen's preference to solving distribution problem among private sector (*ST*, 13, 17 September, 4 October, 24 December 1969).

which became more influenced by Malays than ever. This development led to the Constitution (Amendment) Bill 1971.

The issues of constitutional amendment and the economic distribution among ethnic groups were discussed in the National Consultative Council (NCC) that consisted of the NOC, Federal and State governments, representatives of religious, ethnic, gender, economic and professional groups, and governing and opposition parties. Based on the discussion in the NCC, the Government drafted the constitution amendment bill.

The next section will trace the discourse of various parties involved in the legislation and identify their interests regarding the new rule. As the information regarding NCC is classified as official secrets to date, *Official Report of the House of Representatives* and newspaper articles will be used as main sources.

IN DEFENCE OF RIGHTS AND INTERESTS OF RESPECTIVE ETHNIC GROUPS – IDENTIFYING THE INTERESTS

In tabling the bill, Razak, who became the Prime Minister by then, explained the background and purpose of the bill. According to Razak, the May 13 tragedy was caused by “irresponsible elements,” who “created fear and anger by questioning and ridiculing the provisions to the Constitution relating to *Bahasa* (language) Malaysia and the special position of the Malays, which exacerbated the growing sense of insecurity felt by the Malays when they see the widening gap between them and the non-Malays particularly in the economic and educational spheres,” and who “created fear and mistrust that the legitimate interests of the non-Malays as provided for in the Constitution would be eroded.” The purpose of the bill was explained to restrict the public discussion on these issues for the sake of the smooth functioning of parliamentary democracy and to address ethnic imbalances by law⁷.

The government’s explanation met challenges from two opposition parties.

Opposition based on individual political rights and ethnic equality—DAP and PPP

DAP, a multi-ethnic party mainly supported by lower strata of Chinese voters, was the only party that voted against the bill. They did so based on their opposition to the restriction of political rights of people and institutionalization of ethnic inequality.

Rejecting the Government’s explanation on the riot as “one-sided, misleading and poor distortion of the truth⁸,” the DAP maintained that the riot started “because there were people who were not prepared to accept the verdict of the people at the polls...which returned an unprecedented number of Opposition candidates⁹.” For the DAP which saw the

⁷ *Penyata Rasmi Parlimen Dewan Rakyat (PRPDR)*, 23 Februari 1971, *Perdana Menteri* (Abdul Razak Hussein), pp.53-55.

⁸ *PRPDR*, 25 Februari, 1971, Goh Hock Guan, pp.262-263.

⁹ *PRPDR*, 23 Februari, 1971, Lim Kit Siang, p.87.

Alliance's rejection of the electoral result as the cause of the riot, the amendments to Article 10, 63 and 72 were nothing but "a political move to bolster the fortunes of the ruling Alliance Party¹⁰," which entrenched "the inalienable right of the Alliance party, specifically the UMNO, to rule forever beyond question" by muzzling the Opposition¹¹.

DAP also rejected the prohibition of questioning of the status of Malay language as the sole official language. Referring to the fear of "people at large" over "the use of the National Language as an instrument for the eventual annihilation of other languages," the party maintained that "the fact that the National Language...is bound to become the chief language of administration in this country need not, and should not, mean that the other major languages in the country, namely Chinese, Tamil and English, are not accorded even a subsidiary official status and use in the country¹²."

The party further found the amendment to Article 153 as irrelevant based on the understanding that the alleged racial disparity was not inherently a racial disparity but rather a disparity between urban sector that was predominantly non-Malay and the Malay-dominated rural sector. For the DAP, the amendment was not only irrelevant but detrimental as it meant "denying non-Malay students with better qualifications," and "non-Malay students who were denied places and their parents and relatives will resent such discrimination¹³."

The PPP, another multi-ethnic party supported mainly by Chinese workers in Perak, argued against Article 10(4) and the Sedition Act from the point of fair application of law and due process. P. Seenivasagam, the President of PPP, mentioned the possibility of the unfair application of seditious charge. He asked if it was legitimate for the Malays to say "...we want 90% of all coffee shops, we want 99% of this, we want 75% of that," and "to agitate...and create...ill-feeling among the non-Malays." Then he asked whether non-Malays would be charged under the Sedition Act if they said in a reply to the above assumed Malay statement, "[Y]ou are interfering with the legitimate rights of the non-Malays to run...businesses." He went on to ask if the Act was "intended to apply only to one section of the community while the other section can mount a platform, get anywhere and talk what they like, inciting racial feelings?¹⁴"

Seenivasagam also contended that the bill lacked of legal consistency: Article 159 which prescribed the conditions for constitutional amendment was already meaningless as nobody including Minister could move to amend the entrenched provisions, now that doing so was a criminal offence under the Seditious Act. He also criticized the amendment to Article 63 and 72 contravening to democratic principle by saying "the most degrading step which any democracy in any part of the world can take," and suggested the amendment to Standing

¹⁰ *Ibid.*, p.77.

¹¹ *PRPDR*, 25 Februari 1971, Goh Hock Guan, p.265.

¹² *Ibid.*, p.79-80.

¹³ *Ibid.*, p.85.

¹⁴ *PRPDR*, 24 Februari, 1971, S. P. Seenivasagam, pp.157-158.

Rules and Orders in the Parliament instead¹⁵. Based on these positions, the PPP abstained from voting.

In spite of the clarity of their counter-positions, arguments based on procedural justice and the equal treatment of ethnic groups, these two parties failed to gain support. Instead, what prevailed was the concern about the rights and interests of respective ethnic groups.

Protecting the special position and Malay language endorsed by “historical bargain” – UMNO, PAS, and Malay Business

The Malay groups’ intention in supporting the bill was twofold. First, they aimed at expanding the scope of the special position of the Malays. Second, they intended to restrict rights to challenge the special position of the Malays and the status of Malay language.

Their utmost concern was the Malays’ backwardness in the area of education and economy. Referring to the figures indicating the low participation of Malays in professional employment such as doctor and engineer¹⁶, and enrolment in higher educational institutions¹⁷, UMNO MPs called for the increase in the number of Malay students in higher educational institutions to address the problem by inserting the new Clause (8A) to Article 153¹⁸.

Also cited were the figures showing the low participation of Malays in industry and commerce such as construction, logging, mining, hotels and transportation¹⁹. Referring to the figures and the difficulty Malay entrepreneurs faced in acquiring loan from non-Malay banks, Ghafar Baba, the Minister of National and Rural Development, argued that Article 153 had to be implemented in various methods including state-sponsored projects and loans, “in order to help Malays to get bigger piece of cake in the area of commerce and industry²⁰.” He further stated that if Chinese and Indian, who “fill all the industrial area of all levels in this country,” “did not cooperate so that Malays could have a share in the industry,” “racial

¹⁵ *Ibid.*, pp.158-159.

¹⁶ Figure cited was the total number of doctors and engineers in the government sector, which was 96 for Malays and 949 for non-Malays. *PRPDR*, 2 March 1971, *Menteri Pembangunan Negara dan Luar Bandar* (Abdul Ghafar Baba), p.416.

¹⁷ Figures included pre-university education enrolment in 1969, which was 397 Malays to 1,740 non-Malays. *PRPDR*, 24 February 1971, *Setiausaha Parlimen Kepada Menteri Penerangan* (Shariff Ahmad), p.375.

¹⁸ *PRPDR*, 24 February 1971, Ahmad Arshad, p.138; March 2, 1971, Bibi Aishah Hamid Don, p.440; *Menteri Kesihatan* (Sardon Jubir), p.450.

¹⁹ Figures cited were as follows: 1,687 out of 5,510 registered contractors were Malays; 51 out of 453 timber mills and 70 out of 1058 mines were owned and managed by Malays; there was no large scale hotel managed by Malays; 20% of the bus and lorry employee were Malays. *PRPDR*, 2 March 1971, *Menteri Pembangunan Negara dan Luar Bandar* (Abdul Ghafar Baba), p.417.

²⁰ *Ibid.*, p.413.

dispute would be endless²¹." The call for the Government's intervention into economy was also echoed by the Associated Malay Chamber of Commerce (AMCC)²².

Aside from the implementation and expansion of the scope of Article 153, UMNO and PAS required the protection of the Article related to the special position and the status of Malay language. UMNO MPs maintained that the special position of the Malays "is a right which must be guaranteed in return for their generosity in agreeing to share their political rights with their non-Malay brothers and sisters" by granting the latter citizenship²³. Given the nature of the deal, "the demand on the part of non-Malays to abolish the Article 153...is similar to the Malay's call for withdrawal of citizenship conferred to non-Malays²⁴." A similar explanation was applied to Article 152 on the status of Malay language. One UMNO MP noted that "[W]e have already granted them citizenship, and wanted them to use a language which could integrate them (into the country). (However,) all of a sudden they want (their) languages to be authorized to be the official languages... it is better to deprive the citizenship of persons like this than to let them stay and bring about disorder in this country²⁵."

For UMNO politicians, the special position and the status of Malay language were enshrined in the Constitution as a result of the "agreements among Chinese, Malays, and Indians" at the time of the independence, which "have to be abided by and cannot be dug up (*di-ungkit*)."²⁶ These provisions had to be put beyond the public discussion by the new Article 10 (4), because "DAP and other parties," which "had not existed" at the time of the agreement challenged these provisions and caused the riot²⁶.

The same view was shared by PAS. Referring to the proportion of Malay voters to total voters, which decreased from 84.2% before independence to 56.8% after independence, the party President Mohamed Asri Muda argued that this was "one of the evidences how Malays were generous in giving their political rights to non-Malays²⁷." He contended that the Government's policy had been wrong as it "gave too much political rights which had once been controlled by Malays to non-Malays²⁸," while "Malays have not received appropriate economic rights as they had been promised²⁹." Asri then concluded: "I will support the expansion of power (of the Government), and even further expansion of it, for the purpose of protecting the position of the Malays³⁰."

From the above discussion, the intentions of Malay-based organizations are clear. In an attempt to overcome their backwardness in the field of economy and education, they

²¹ *Ibid.*, p.421.

²² When Sino-Malay Economic Advisory Board was formed between ACCC and AMCC, AMCC asked the Government to sponsor it "in view of the possibilities of certain sensitive issues coming up for discussion." *ST*, October 17, 1970. Also refer to note 6 above.

²³ *PRPDR*, 1 Mach 1971, *Menteri Perdagangan dan Perusahaan* (Mohamed Khir Johari), p.344.

²⁴ *PRPDR*, 2 Mach 1971, *Menteri Pembangunan Negara dan Luar Bandar* (Abdul Ghafar Baba), p.410.

²⁵ *PRPDR*, 23 Februari 1971, Ahmad Arshad, p.115.

²⁶ *Ibid.*, Raja Nong Chick Raja Ishak, p.110.

²⁷ *PRPDR*, 25 Februari 1971, Mohamed Asri Muda, pp.211-212.

²⁸ *Ibid.*, p.194.

²⁹ *Ibid.*, p.212.

³⁰ *Ibid.*, p.216.

promoted the amendment to Article 10 and 153 so that their special position, which they understood had been duly given to them in return for the citizenship of non-Malays, would never be questioned and the Government could effectively implement policies to redress their backwardness.

It should be noted that there were different attitudes among the Malay politicians toward the extent of restriction of freedom and the distribution of rights among ethnic groups. One of the contested issues was the implementation of Article 153. High ranked UMNO MPs and Ministers argued that due regard should be given to the legitimate interest of non-Malays and that non-Malays would also benefit from the implementation of the Article³¹. Dr. Ismail, who had a huge influence as an architect of the political institutions after the riot, was even concerned about the special position of the Malays being somewhat associated with the superiority of Malays (Ooi 2006, 225).

On the other hand, an UMNO MP representing a rural area demanded the expansion of the scope of Article 10(4) to include the implementation of Article 153, which “would bring about sensitive feelings.” The MP expressed her concern that the industrial area constructed under the Second Malaysia Plan would not benefit local Malays because people outside of the area would be employed instead of Malays considering the general lack of skill among rural Malays³². This line of thought was common among grass-roots members of UMNO who were concerned about the issue of unemployment among Malays in rural areas and demanded the Government’s direct action on it³³.

Aside from the tougher control on freedom regarding the implementation of Article 153, there were radical calls aired by PAS MPs on the citizenship and the definition of the “official purposes.” For example, the party President hinted that the standard of the national language exam for the applicants for the citizenship was inadequate³⁴. Another PAS MP further demanded the expansion of the definition of “official purposes” in Article 152 to include “shops, lorries, and business areas” as places the use of national language should be imposed³⁵.

These demands—the restriction of freedom of speech on NEP, revision of citizenship exam and the widening of the scope of the usage of the National language, however, never materialized as they were well checked by non-Malay-based organizations that tried to safeguard their rights and interests from the siege by Government and Malay political parties.

³¹ PRPDR, 24 Februari 1971, Syed Nasir Ismail, p.164; 2 Mach 1971, *Menteri Pembangunan Negara dan Luar Bandar* (Abdul Ghafar Baba), pp.410-426.

³² PRPDR, 2 Mach 1971, Bibi Aishah Hamid Don, p.438.

³³ A UMNO member argued that employers should be forced to allocate 40% of their workforce to Malays. *ST*, 24 January 1971.

³⁴ PRPDR, 24 Februari 1971, Mohamed Asri Muda, p.223. Asri described the language exam as “when asked nose, answer nose, and asked ear, answer ear.”

³⁵ PRPDR, 1 Mach 1971, Abdul Wahab Yunus, p.385.

Safeguarding the interests and rights of non-Malays and their position in the Government—MCA, ACCC, Chinese professionals, and MIC

Before we look into the argument by the non-Malay groups, it is important to reemphasize the fact that the power balance among the Alliance parties in the government shifted toward the UMNO as a result of the MCA's defeat in the 1969 election. However, the non-Malay communities were far from passive in the political process of Constitutional amendment. Rather, they tried to safeguard their interest and rights by creating a new political rule.

The MCA and those who were close to the party, namely, ACCC and Chinese professionals who organized the Chinese Liaison Committee under the leadership of a lawyer Alex Lee, supported the amendment. For example, T.H. Tan, the President of ACCC said that the entrenchment of several constitutional provisions "would contribute to all Malaysians" (*ST*, 17 September 1971). Likewise, MCA President Tan Siew Sin noted the amendment "is clearly to the advantage of the non-Malays³⁶."

There were four reasons for their support for the Constitutional amendment: protecting their citizenship; protecting the use and study of Chinese; curbing the opposition parties; and securing their rights to question the affirmative action under NEP.

Firstly, they aimed at protecting and entrenching the Part III of the Constitution. As noted earlier, citizenship became the issue as Malay politicians were attacking it, and as the Employment (Restriction) Act and the review of citizenship certificate triggered fear among non-Malays that their status as citizens was now under the siege by the Government. A MCA Minister's statement represents the sentiment of Chinese at the time: "I myself have always felt very unhappy when the status of a non-Malay's citizenship is questioned. Let it be known once and for all that once a citizenship is granted, he or she has equal right as anyone else under the Constitution³⁷." Thus, the MCA and business and professional organizations supported the amendment so that "no one will be able to question the inalienable right of the non-Malays to full citizenship in this country³⁸."

Secondly, by amending Article 10 and 152, MCA sought to protect the use and study of Chinese language from the attack by Malay politicians³⁹. For MCA, these amendments were to stop "utterances like the closing down of Chinese schools⁴⁰" through various ways: providing the definition of "official purposes" in Article 152 which had the effect of clarifying "unofficial purposes" for which non-Malay languages were legitimately used and studied; and curbing the questioning of the said Article. MCA believed that while Article 10(4) "provides for the national and official status of the Malay language, it also ensures continuity of the use and study of the languages of other communities in this country⁴¹."

³⁶ PRPDR, 23 Februari 1971, *Menteri Kewangan* (Tan Siew Sin), p.69.

³⁷ PRPDR, 25 Februari 1971, *Menteri Muda Buroh* (Lee San Choon), p.261.

³⁸ PRPDR, 23 Februari 1971, *Menteri Kewangan* (Tan Siew Sin), p.69.

³⁹ For example, UMNO Youth had adopted a resolution that all schools should be national schools with the Malay language as medium language. *ST*, 23 January 1971.

⁴⁰ PRPDR, 25 Februari 1971, *Menteri Muda Buroh* (Lee San Choon), p.261.

⁴¹ PRPDR, 23 Februari 1971, *Menteri Kewangan* (Tan Siew Sin), pp.69-70.

Thirdly, MCA intended to stifle the opposition party, in particular DAP which gained public support by questioning Article 152 and 153. MCA leaders explicitly uttered their frustration over their "disadvantage" in getting support among Chinese for having to defend the Alliance's stand on education, language and the special position of the Malays (*ST*, 19 January 1971). A MCA MP stated: "[A]ll that an unscrupulous Chinese politician has to say is, 'why should Chinese not be made official language and that the Malays' special position should be abolished.'" However, "[N]o political party in power...could obtain maximum support from the people because obviously they have to take a middle course⁴²." For the MCA leaders, the function of Article 10(4) was to enable them to win votes while taking a "middle course," by eliminating the special position and language from the realm of public discussion.

Finally, Article 10(4) was important for MCA and Chinese business and professional community in safeguarding their interests in the process of the implementation of NEP. The series of Government's action and the assertion of the special position by the Malay political parties did not only make the Chinese community anxious over their interest in the business and employment, but also concerned about the non-Malay poor who might be overlooked given the emphasis on the inter-ethnic equality⁴³, and the possible deprivation of educational opportunity of non-Malays due to the reservation of educational opportunity to Malays⁴⁴.

For MCA leaders who had expected the special position to be deleted in due course, accepting the protection and entrenchment of Article 153 should have been a tough decision. A MP argued as follows: "I have heard them (Malay leaders) say that when the time comes, they will voluntarily ask that this special position be removed...This temporary handicap is necessary to ensure that one day the Malays would be in a position to compete with non-Malays on equal footing⁴⁵."

In spite of the anxiety that the position might go beyond a temporary measure after the constitutional amendment, however, posing an outright opposition was not a viable option for them, because it was easily anticipated that such an action would induce UMNO and PAS politicians to attack non-Malays' citizenship in return, given their "historical bargain" view that their special position was incorporated in the constitution in exchange for citizenship.

Noting this, MCA supported the Parliament's new power to prohibit questioning of Article 153, "otherwise than in relation to the implementation." Tan Siew Sin explained the clause as: "it is made crystal clear that this will not affect the right of any person to question the method of implementation of the provisions concerned (*ST*, 24 January 1971)." In other

⁴² *PRPDR*, 25 Februari 1971, Khaw Kai Boh, p.281.

⁴³ For example, Alex Lee argued "have-nots" of all races had to be aided without discrimination and no one should be deprived of job opportunity because of the ethnicity. *ST*, 8 February 1971.

⁴⁴ A MP mentioned the "rumours that not only the non-Malays are deprived of their places, they would also be deprived of opportunities to send their children abroad for higher education in one way or another through administrative obstructive measures." *PRPDR*, 25 Februari 1971, Khaw Kai Boh, p.283.

⁴⁵ *PRPDR*, 25 Februari 1971, *Menteri Muda Buroh* (Lee San Choon), p.261. Also refer to Fernando (2002: 143-88).

words, MCA intended to secure their rights to question the implementation matters such as quota in university admission, employment and wealth distribution under Article 153.

MIC shared with MCA the same four reasons for the support. The party's Deputy President argued that with the passage of the amendment, "no longer will it be possible for persons, including members of Parliament, to use the privilege of this august body to...suggest harsh action such as deprivation of citizenship, deportation and so on anyone who happens to differ⁴⁶." The prohibition of questioning of Article 152 regarding language was similarly hailed because "the bill should call a halt to the voices in this House and elsewhere that complain that public funds are being spent on Chinese or Tamil education⁴⁷."

MIC also found that Article 10(4) was equipped with "important safeguard," because "[T]he right and duty of the elected representatives of Parliament" and "every citizen to hold under scrutiny, question, comment or criticism the manner of implementation of these provisions of the Constitution are carefully safeguarded⁴⁸." MIC's support for the bill was also intended to contain the activity of the opposition parties. MIC leaders stated that "the election campaign and subsequent disturbances in 1969 clearly show that in the effort to win votes, the voice of reason has extreme difficulty in rising above the malicious oratory and whispers of racial extremism⁴⁹." The Bill was understood by the party to "clamp down on... nefarious activities" of DAP and PPP⁵⁰.

Aside from these reasons, the MIC, in representing the Indian community that accounted for less than 10% of the population, found the bill as essential to maintain the coalition government, which enabled them to access to the policy making process, in spite of their numerical size. The Party's Deputy President Manicavasagam stated:

"[T]he intricate compromises and accommodation that went into the formula for political independence...was based, *not on counting of heads and apportionment of rights and privileges on this head count, but on the acceptance that all communities, indigenous and others, large and small, had a stake in this nation (Italic added).*"

According to him, this formula materialized because "rights and interests were protected," "and opportunities and help offered, where such help was necessary." However, "this concept of one nation from a multi-racial base and equal opportunity through additional help for the disadvantaged...became fair game for political opportunists and adventurers. It is to prevent such opportunism and adventurism that this Bill is presented before this House⁵¹." In sum, MIC supported the bill to protect the coalitional government formula based on the agreed rights including the special position of the Malays, thereby secure their access to the policy making process.

⁴⁶ PRPDR, 23 Februari 1971, Menteri Buroh (Tan Sri V. Manickavasagam), pp.174-175.

⁴⁷ *Ibid.*, p.175.

⁴⁸ *Ibid.*, pp.175-176.

⁴⁹ *Ibid.*, p.175.

⁵⁰ PRPDR, 2 Mach 1971, Menteri Kerja Raya, Pos dan Talikom (V.T. Sambanthan), p.434.

⁵¹ PRPDR, 23 Februari 1971, Menteri Buroh (Tan Sri V. Manickavasagam), pp.177-178.

In between democratic norms and the rights and interest of ethnic group – GRM

GRM was another opposition party that voted for the bill. However, the MP's attitude toward the bill was divided between the former MCA MPs including the Chief Minister of Penang Lim Chong Eu who supported the bill without reservation, and the former Labour Party members such as Tan Chee Khoon who did not fully agree to the bill.

Tan Chee Khoon described the bill as “bell tolls for the death of democracy⁵²,” because the amendment to Article 159 violated the principle of people's sovereignty, Articles 63 and 72 restricted Parliamentary immunity⁵³, and because the Sedition Act, in spite of being the ordinary law, was entrenched under Article 159. He also criticized the quota for the Malays in higher educational institution as a “clumsy way⁵⁴.”

In spite of his opposition from the point of due democratic procedure and ethnic equality, he voted for the bill. The reason was the general anxiety among non-Malays over the use and study of non-Malay languages and citizenship. Tan stated: “we are in agreement that the provisions relating to Citizenship and Article 152 relating to the national Language should be placed beyond the reach of the demagogue⁵⁵,” and that “[T]here is a need...to spell out in greater detail and precise terminology the guarantees regarding the study and use of other languages so that we can set at rest the genuine fears and anxieties of the non-Malays in this country⁵⁶.” As a multi-ethnic party, GRM also did not forget to “reassure the Malays that Gerakan was willing to recognize their fears and feelings (Vasil 1987: 134).

In sum, despite the fact that GRM members who embraced social democratic principle found the bill as contravening to the due process, freedom of speech and popular sovereignty, all members voted for the bill at the end because they found it protected citizenship and rights relating to non-Malay languages.

The above discussion shows that Malay and non-Malay organizations including governing and opposition parties had their respective interest served or satisfied by the constitutional amendment. Based on the above findings, the next section presents the Constitution (Amendment) Act 1971 as a product of the bargain between the Malay and non-Malay groups over their respective rights.

⁵² *PRPDR*, 25 Februari 1971, Tan Chee Khoon, p.258.

⁵³ The issue of the Parliamentary immunity was the most controversial issue which divided the party between Lim and the Party president Syed Hussein Alatas on the one hand and the former Labour Party members on the other. *PRPDR*, 1 Mach 1971, Lim Chong Eu, p.355; *Berita Harian*, 11 Mach 1971.

⁵⁴ Tan Chee Khoon said the preferential enrolment of Malay students had existed for many years in the national university, whereby Malay students with lower High School Certificate score were accepted while non-Malay students with higher scores were denied (*PRPDR*, 25 Februari 1971, Tan Chee Khoon, pp.252-255).

⁵⁵ *Ibid.*, p.249.

⁵⁶ *Ibid.*, p. 251.

BARGAINING FOR BINDING AGREEMENT – DYNAMICS UNDERLYING THE CONSTITUTIONAL AMENDMENT AND ITS IMPACT

Tying each others' dominant hand through bargaining

Based on the idea of due process, freedom of speech and the principle of equality of opportunity among ethnic groups, DAP voted against and PPP abstained from the Amendment bill. However, generally speaking, uncertainty over the rights and status of respective ethnic groups prompted Malaysians to prioritize the protection of their rights and interests over liberal democratic principles.

Awareness of their own economic backwardness and questioning of the special position of the Malays during the 1969 election prompted UMNO, PAS and Malay businessmen to seek for Government intervention into economy. To this end, they promoted Constitutional amendment prohibiting the questioning of Article 153. Malay political parties also intended to protect the status of Malay language.

On the other hand, witnessing the strong demand for the protection and implementation of special position by Malay organizations and the shifting power balance toward Malays in the Government, non-Malay groups sought for the way to avoid the possible siege on their rights and interests by Malays and the Government. MCA, MIC, GRM and non-Malay business and professional community promoted the new Article 10(4) which banned questioning of provisions related to citizenship while guaranteed the right to question NEP. Language was another concern for non-Malays. Recognizing the call from Malay politicians for wider use of national language, non-Malay groups promoted the amendment to Article 152 to demarcate the area where the non-Malay languages could legitimately be used and studied. MIC also aimed to ensure their position in the Government.

Aside from this, the governing parties also had intention to curb the opposition parties. However, the overall dynamics underlying the legislation of the Constitution (Amendment) Act 1971 can best be grasped as a bargain between the Malays and non-Malays including both governing and opposition parties. The special position of the Malays was protected and entrenched in exchange for the protection and entrenchment of citizenship, the guarantee of the right to discuss the implementation of the special position of the Malays to safeguard the legitimate interest of non-Malays, and the access to the decision-making by the ethnic minority. Likewise, the position of the Malay language as a sole official language was affirmed in exchange for the guarantee of the use and study of non-Malay languages for unofficial purposes.

In sum, the Constitution (Amendment) Act 1971 is understood as a new rule crafted by both Malays and non-Malays, in the context of deep-seated sense of ethnic cleavage and power asymmetry in favour of the former, to tie each other's dominant hand, which otherwise might attack the other's vital rights and interests.

Article 10(4) as a double-edged sword

One effect of the 1971 amendment is the restriction of freedom under the Sedition Act defining questioning of the Part III, Article 152, 153, and 181 of the Federal Constitution as crime. Under the said provision, an editor of Malay paper *Utusan* was convicted for publishing an article with the sub-heading “[A]bolish Tamil and Chinese Schools”, and a BN MP for asserting the abolishment of Tamil and Chinese schools and signboards of these languages⁵⁷. Aside from these cases, restrictive effects can be observed in the cases discussed or investigated under the Act. For example, the UMNO Youth lodged a police report against a Chinese group for demanding the abolition of the distinction between *Bumiputera* and non-*Bumiputera*⁵⁸. On the other hand, DAP, MCA, GRM and MIC did the same against UMNO politicians over their remarks mentioning Chinese as “immigrants⁵⁹,” or emphasizing the supremacy of Malay rights (*SUN*, 28, 29, November 2006), to name a few instances. The alleged violators are often forced to withhold their statements, and in some cases, are warned or disciplined by the authority or the party leadership.

It is important to note that the Sedition Act has been “enforced even-handedly” to both those who argued for the restriction of the rights of non-Malays and those who question the special position of the Malays and *Bumiputeras* (Harding, 2007: 126). Indeed, it appears more as a double-edged sword as both majority and minority ethnic groups resort to in order to check the behaviour by the other and to safeguard one’s interests and rights.

This nature can be observed in the relations between the Government and citizens. As already seen, the Government restricts the citizen’s behaviour through the application of the Sedition Act. However, as Article 10(4) guarantees the rights of citizens to discuss implementation of the “sensitive” provisions, the Government cannot restrict the discussion of it, even when the discussion develops against the favour of the Government. Accordingly, the arena of discussion on the policies including the NEP has been guaranteed.

The Government has taken various policy measures since the introduction of NEP. These include the Industrial Coordination Act (ICA) of 1975 that empowers the Minister to confer or revoke the operation license of manufacturing companies based on their compliance to the NEP guideline; regulations by the Securities Commission and Bursa Malaysia to enforce the listed companies to have 30% *Bumiputera* participation; the Government concessions, tender award and privatization project; and the government-linked companies (GLCs).

All of these have been the subjects of public discussion. For example, the Associated Chinese Chambers of Commerce and Industry of Malaysia (ACCCIM) and the Federation of Malaysian Manufacturers have continually demanded the liberalization of ICA, leading to the amendment to the Act in 1985. The 30% equity target became a hot topic before the end of

⁵⁷ *Melan Abdullah v. Public Prosecutor* [1971] 2M.L.J. 280; *Public Prosecutor v. Mark Koding* [1983] 1M.L.J. 111.

⁵⁸ Loone, Susan. (2000) “Let Federal Court decide on Sūqiu issue: Kit Siang,” <http://www.malaysiakini.com/news/536>, 22 December (downloaded 13 October 2010).

⁵⁹ Anand, RK. (2010) “PM aide’s racist remarks spark outrage,” <http://www.malaysiakini.com/news/123498>. 2 February (downloaded 13 October 2010); Bernama. (2010). “Police to record Nasir’s statement,” <http://www.malaysiakini.com/news/123831>. 6 February (downloaded 13 October 2010).

the NEP in 1991. ACCCIM, GRM, MCA and Chinese NGOs called for the termination of or modification to the ethnic quota⁶⁰, while UMNO demanded the continuation of NEP (*NST*, 8, 23, February 1987). Reflecting the demands by both parties, the New Development Plan, a successor plan to NEP, did not set a specific numerical target during the period of the plan⁶¹. The equity target again became the matter of intense controversy when an independent think-tank Asian Strategy and Leadership Institute (ASLI) published a report maintaining the *Bumiputera* share of corporate equity stood about 45%, much higher than the official statistics of 18.9% (CPPS 2006). The report induced a debate on the research methodology and the impact of the affirmative action on economic growth and inter-ethnic relations, leading to the disclosure of some government information on the methodology of the calculation of equity.

From stabilizer to a source of uncertainty?

The Article binds not only the minority ethnic groups and citizens but also ethnic majority and the Government. Both minority and majority ethnic groups resort to the Article in order to safeguard their rights, thereby mitigating the fear that the fundamental rights would be violated or attacked by others. The Article also provides space, where various groups in the society can express their thoughts about policies and even sometimes make their demands reflected in the Government's decisions.

These qualities have reduced the possibility of confrontation among ethnic groups by mitigating the mutual fear, and moderating the dissatisfaction against the Government by securing the space of democratic sphere for expression, albeit restricted. The restriction of political freedom on the ethnic matters based on the binding agreement among various parties is one of the sources for the endurance of Article 10(4) and the political system based on it.

However, we should not miss the sign of contention over or erosion of the normative basis of the Article. The debate regarding the ASLI report serves as an indicator of the growing uncertainty about Article 10(4). As already described, the debate initially was on the implication of the 30% target on national economy and the accuracy of data and methodology. However, the report soon came to be interpreted by some UMNO politicians as "touching on" or "undermining" the special position of *Bumiputeras*⁶². The two arguments on different planes, one about policy and scientific methodology and the other about the sensitive issues, indicates the lack of common understanding as to what kind of speech is prohibited and what is guaranteed under Article 10(4). The Government further complicated the situation when it hinted on the application of the Sedition Act only to obscure the

⁶⁰ Nanyang Sim Pau, 11 September 1986; *New Straits Times*, hereafter *NST*, 7 June, 29 June, 2 July 1987; GRM (1984); Kok et. al. (1990); Kua (1990).

⁶¹ *The Second Outline Perspective Plan*, section 4.33, 4.60; Heng (1997).

⁶² *SUN*, October 10, 2006; Abdul Aziz, F. (2006). "Khairy to Asli: Damage Done," <http://www.malaysiakini.com/news/58035>. 11 October (downloaded 13 October 2010). The pressure from the UMNO politicians eventually led to the withdrawal of the report by ASLI and the resignation of the researcher in protest of the withdrawal.

demarcation between questioning of the Constitutional provisions and their implementation (*NST*, 13 October 2006). The recent discourse on the “Ketuanan Melayu (Malay supremacy)” as if it is a constitutional right is also a clear sign of the misunderstanding of the Article by Malay activists.

The erosion of a common understanding of the Article is not surprising considering the fact that the Act is almost four decades old and the parties to the 1971 agreement have already been replaced by a new generation of leaders. Now that more than 70% of the population is below 40 years old, who were born after 1969, it is understandable if population at large do not share the understanding about the Article at the time of legislation.

Aside from the change in actors, the circumstances have also changed to fray the interlocking interest that once was the foundation of the Article. Firstly, owing to the implementation of Article 153, *Bumiputeras*, especially Malays, have made distinct progress in the economy. For example, they constitute half of the management and professional employment, doctors and engineers to name a few selected jobs. The income disparity ratio between *Bumiputeras* and Chinese dropped from 1 : 2.29 in 1970 to 1 : 1.38 in 2009 (Malaysia, 2010: 146-147). They have established their participation in economic sectors including mining and banking in which Malays were underrepresented in 1971 (CPPS, 2006). Secondly, the anxiety over the citizenship among non-Malays is not as prevalent as in 1971. Thirdly, the intra-Malay split has become obvious since the 1990s over the abuse of the affirmative action for political power such as the distribution of the patronage in the form of awarding of government contracts and *Bumiputera* share of listed companies (Gomez and Jomo 1999; Gomez 2002). It is now difficult to assume Malays as a unitary actor with a common interest (Cheah 2002; Gomez 2007).

These changes seem to have obscured the significance of the bargain in 1971 and the understanding of the rule established by it. This may be the case more to the eyes of non-Malays who had the assumption that the special position of the Malays was a temporary provision. Nowadays, liberal claims for equal treatment under the law and freedom of speech, which was rather marginalized in 1971, are regaining strength.

Article 10(4) has been functioning as a stabilizer by mitigating fear and guaranteeing the democratic sphere by providing a clear set of rules as to the behaviour of individuals and the limit of the power of the Government. However, when the common understanding on the rules is obscured and the interests that bolstered the legitimacy of the Article are corroded due to generational and structural changes, the same Article may become a source of uncertainty and even an arena of conflict.

CONCLUSION

The Constitution (Amendment) Act 1971 was not a product of the sheer will of the Government nor majority ethnic group. It was not a mere reaffirmation of elite cooperation under the consociational framework either. The Act was the embodiment of the binding agreement not to attack each other's basic rights and interests between Malays who tried to

secure their special position in the Constitution and non-Malays who tried to secure their rights in the obviously asymmetric power distribution. The 1971 amendment has been used by various ethnic groups in order to protect their rights and status from being infringed upon by others. It has also been referred to by citizens in order to guarantee the democratic space by limiting the power of the Government, as it is by the Government to regulate the freedoms of citizens..

In the young societies where politicians and electorates are not given enough time to internalize "democratic self-control" (Schumpeter, 1975: 294), the free competition for political power tends to result in the harsh attack on the vital interests and rights among the rivals, thus creates mutual fear and hostility. Regime instability and breakdown of democracy may follow. In such societies, restriction of freedom to mitigate the mutual fear and guarantee the reasonable space for democratic discussion can be a realistic institutional setting. The restriction of political freedom by Article 10(4) was necessary to enable the Parliamentary system to work in Malaysia that was merely 14 years old.

Four decades have passed since the enactment of Article 10(4). The structural changes have led to the uncertainty over the understanding on the Article among various groups today. When the clarity and legitimacy of a rule exhaust, the same rule may become the source of uncertainty and contestation rather than the guarantee of space and rights. The question is whether the change brings liberalization.

We can ask the question in another way: are Malaysians ready to do away with the Article binding their hands? The answer is ambiguous. The current state of Malaysia is still characterized by the frequent reference to the Sedition Act both by majority and minority ethnic groups and the governing and opposition parties. This means that people still depend on the restriction rather than the "democratic self-control" in order to protect their rights. In other words, the mutual fear that constituted the Article 10(4) still remains. In addition, the frequent resort to the Act seems to make it deeply embedded in the society as an indispensable norm, making it resistant to change.

Yet, the current configuration is neither a panacea. Harding (2007), while acknowledging the 1971 amendment "was no doubt the necessity of a particular moment in history" and "successful in that it enabled a return to something approximating to constitutional, parliamentary, democratic government," argues "[I]ts fault lay in its unwarranted assumption that it would remain a settlement for all time and that its merits could and should be placed beyond all criticism (2007: 127)."

A viable option will be crafting a new agreement on the appropriate level of restriction on freedom through the bargain among various interests of today. Just as the opposition parties that were absent in the Independence Constitution making were invited to the bargaining process in 1971, the new bargaining process should include new generation reflecting the changing cleavage in today's Malaysia.

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